IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-267

D. J. McCARTHY, Superintendent, California Men's Colony,

Petitioner,

v.

RUSSELL LEE HINMAN,

Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI

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I. THE STATE OF CALIFORNIA HAS MOOTED THIS CASE BY ACCEPTING A PLEA OF GUILTY TO SECOND DEGREE MURDER AFTER FILING A PETITION FOR A WRIT OF CERTIORARI WITH THIS COURT.

A. STATEMENT OF FACTS

1. Respondent was convicted of first degree murder and assault with a deadly weapon after a jury trial held in the Superior Court, Los Angeles, California, in 1975.

2. On October 7, 1976, the California Court of Appeal, in affirming the conviction, held that the only basis for sustaining respondent's first degree murder conviction was on a felony-murder theory, since there was insufficient evidence of premeditation or deliberation. 676 F.2d at 350.

3. In order to sustain respondent's felony-murder conviction, the State had to prove that respondent's associates intended to rob the victim, that respondent was aware of their intention, and that he acted with an intent to assist them at the time he stabbed the victim. 676 F.2d at 350.

4. At trial, the State introduced, as part of its case-in-chief, an un-Mirandized statement of respondent, allegedly made in response to a question by a police officer after the incident, as follows:

> Q: "Why did you run?"
>
> A: "My two friends were going to rob this man . . . . I didn't want to be associated in the robbery." ([R.T., p. 238-239]

5. Respondent thereafter took the witness stand and admitted stabbing the victim, but denied intending to rob the victim at the time of the stabbing, and denied knowing his associates intended to rob the victim at the time of the stabbing. [R.T., p. 441-442]

6. Respondent denied making the alleged statement to the police officer. [R.T., p. 456]

7. The trial court admitted respondent's alleged statement, over defense counsel's objection, despite the absence of proper Miranda warnings. The California Court of Appeal found there was a violation of Miranda, but found the error to be harmless beyond a reasonable doubt. 676 F.2d at 345.

8. After respondent was denied a hearing by the California Supreme Court, he sought habeas corpus review of his conviction in Federal District Court.

9. On December 31, 1980, the Federal District Court found that respondent's statement, taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), was not harmless error beyond a reasonable doubt, granted the Petition for Writ of Habeas Corpus, and gave the State of California 120 days from the day its judgment became final to either discharge respondent or to institute proceedings for a new trial.

10. On January 22, 1981, the State filed a timely notice of appeal with the Ninth Circuit Court of Appeals.

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11. On February 16, 1982, the Ninth Circuit affirmed the judgment of the District Court granting respondent's Petition for a Writ of Habeas Corpus. The Ninth Circuit's Opinion emphasized that the Writ was directed to the first degree murder conviction only, and had no effect upon the assault with a deadly weapon conviction. 676 F.2d at 352.

12. On May 11, 1982, the Opinion of the Ninth Circuit Court of Appeals was amended and the petition filed by the State of California asking for rehearing and suggesting a rehearing en banc was denied.

13. The Mandate of the Ninth Circuit Court of Appeals was issued on May 21, 1982.

14. The Judgment of the Court of Appeals was filed and spread by the District Court on May 26, 1982, which meant that the State of California had 120 days from May 26, or until September 23, 1982, to either discharge respondent or to institute proceedings for a new trial.

15. On June 6, 1982, the State of California filed a Motion for Stay of Mandate in the Ninth Circuit Court of Appeals. On June 9, 1982, the petitioner, State of California, filed a Motion for Recall of the Mandate and for Stay of the Mandate Pending Application to the United States Supreme Court for Writ of Certiorari.

16. On June 28, 1982, the Ninth Circuit Court of Appeals denied petitioner's Motion for Recall and Stay of the Mandate.

/

17. On August 2, 1982, the State of California filed an Application for Stay of Enforcement of Judgment pending the filing of a Petition for Writ of Certiorari with this Court. At the conclusion of the State's application for a stay, the State made the following statement:

> " . . . should our request for a stay be denied, retrial of respondent could deny California an opportunity to have this Court resolve the very important issues raised by this case."
> [Application for Stay, page 10]

18. On August 9, 1982, the State of California filed with this Court a Petition for Writ of Certiorari.

19. On August 16, 1982, this Court denied the State's Application for Stay of Enforcement of Judgment pending the filing of a Petition for Writ of Certiorari.

20. On October 14, 1982, the State of California accepted a plea of guilty from respondent to a charge of second degree murder before Judge Sheila Pokras, Los Angeles County Superior Court, Department South J, Long Beach, California. The docket sheet and the reporter's transcript of this guilty plea are attached hereto and incorporated herein as Appendices A and B. Sentencing is set for November 29.

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B. ARGUMENT

Respondent respectfully submits that the State of California, through its own actions, has mooted the Petition for Certiorari currently pending before this Court by electing to accept from respondent a guilty plea to the lesser included offense.

The State of California has maintained a single position on the single critical issue in this case for more than six years. That position may be summarized as follows:

1. The first degree murder conviction should be sustained because admission of respondent's statement was harmless error.

2. The error was harmless error because " . . . there was overwhelming evidence, apart from the tainted evidence, to support respondent's conviction under a theory of felony-murder." [Petition for Writ of Certiorari, p. 35]

Yet, when faced with the prospect of re-trying respondent without the tainted statement, the State has now accepted a plea of guilty from respondent to second degree murder. This leaves the State of California in the position of petitioning this Court to reinstate a first degree murder conviction after accepting a plea of guilty from the respondent to second degree murder in the same case.

/

The conduct of the State of California in so doing raises fundamental questions quite apart from the ethical and legal issues raised by the State attempting to back out of a plea bargain after a criminal defendant has pleaded guilty.

If petitioner was willing to accept a conviction for second degree murder, either by plea or after a retrial, it should never have challenged the opinion of the Ninth Circuit Court of Appeals by filing a Petition for a Writ of Certiorari in this Court.

Having filed such a Petition with this Court, and then accepting a plea of guilty to second degree murder, the State should now in good faith move to withdraw its Petition for a Writ of Certiorari.

If the State of California fails to so move, it is respectfully suggested that this Court should decline to rule on what are certainly very interesting points of law, but nevertheless points of law which have nothing to do with any current controversy between the People of the State of California and Mr. RUSSELL LEE HINMAN.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

II. THIS CASE IS NOT AN APPROPRIATE ONE FOR REVIEW ON THE ARTICLE III ISSUE BECAUSE THE FACTS OF THIS PARTICULAR CASE DO NOT CLEARLY FRAME THE ISSUES RAISED BY THE PETITION.

A. STATEMENT OF FACTS

1. On August 8, 1977, respondent filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California.

2. On August 12, 1977, the magistrate to whom the case was assigned ordered that the State of California file a Return to the Petition for Writ of Habeas Corpus.

3. On September 6, 1977, the State filed a Return which included a Statement of Facts and Memorandum of Points and Authorities, and which attached the California Court of Appeal's Opinion as an appendix. The State also lodged with the magistrate at this time the clerk's transcript and the reporter's transcript from the trial proceedings.

4. On October 18, 1977, Karen R. Smith, Deputy Federal Public Defender, was appointed by the magistrate to represent respondent.

5. On December 5, 1977, respondent filed a Traverse in response to the State's Return.

6. On December 15, 1977, the magistrate notified both parties that the matter was set for oral argument on January 11, 1978.

7. On January 11, 1978, oral argument was heard by the magistrate. No witnesses were called by either side.

8. On January 30, 1978, the magistrate completed and signed his report and recommendation on the Petition for Writ of Habeas Corpus.

9. On July 19, 1978, United States District Judge William Matthew Byrne, Jr., filed an Order concurring with and adopting the findings and conclusions of the magistrate, and ordering a Writ of Habeas Corpus to Issue within 60 days, unless the State should, in the interim, elect to "institute proceedings for a new trial." Attached to the Court's Order and Judgment was a copy of the report and recommendation of the magistrate.

10. On July 20, 1978, Judge Byrne entered the formal Judgment on his Order of the previous day.

11. On August 10, 1978, the State of California filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals.

12. On October 9, 1979, the Ninth Circuit remanded the case to Judge Byrne because the Magistrate's Act had not been complied with in the following particulars:

(a) A copy of the magistrate's proposed findings and recommendations had not been mailed to all parties.

(b) The State had not been given an opportunity to respond and to file written objections to the magistrate's proposed findings and recommendations;

(c) Judge Byrne had failed to "make a de novo determination of those portions of the report or

specified proposed findings or recommendations to which objection is made" 1/ prior to entering his Order and Judgment.

13. On November 2, 1979, the State filed with Judge Byrne written objections to the report and recommendation of the magistrate.

14. On April 4, 1980, Judge Byrne heard oral argument on the State's written objections to the report and recommendation of the magistrate.

15. On December 31, 1980, Judge Byrne filed a new Order, pursuant to 28 USC §636(b)(3) granting the Petition for a Writ of Habeas Corpus and again ordering the Writ to Issue, unless within 120 days of the District Court's Judgment, the State should elect to "institute proceedings for a new trial." 2/ In so doing, Judge Byrne made it clear that he had conducted a de novo review of the magistrate's findings, and that "the ultimate decision" had been his alone. 3/

1/ See Order for Remand, attached hereto and incorporated herein by reference as Exhibit C, page 2.

2/ See Judge Byrne's Order, attached hereto and incorporated herein by reference as Exhibit D.

3/ Ibid., page 2.

B. ARGUMENT

In the Petition for Writ of Certiorari, petitioner states that:

> " . . . Legal practitioners involved in habeas corpus matters brought under Section 2254 are painfully aware of the difficulties of conducting evidentiary hearings in habeas corpus cases where the facts are stale, witnesses difficult to locate and, when they are found, their memories dimmed by the passage of time. In this respect, the personal observation of an Article III judge of a witness' demeanor takes on greater siginificance than that of a suppression hearing which would be more contemporaneous to the events."
> [Petition for a Writ of Certiorari at Page 33-34]

Petitioner's legal argument is persuasive, but it has no application whatsoever to the facts of this case. While it is true that an evidentiary hearing was held before the magistrate to whom the district court judge initially assigned the case, neither the State nor respondent called any witnesses to testify before the magistrate. Therefore, the lack of the district court judge's opportunity to make a personal observation of a witness' demeanor has no significance whatsoever in this case. Furthermore, if the State had felt it necessary to have an Article III judge make a personal observation of the demeanor of witnesses, the State had every opportunity to have Judge Byrne do so when, after remand by the Ninth Circuit, Judge Byrne held a de novo evidentiary hearing on the State's objections to the findings and recommendations of the magistrate.

The State goes on at some length to make the following points in its Petition for a Writ of Certiorari:

(1) "Article III was created for the very purpose of protecting the State's right to be heard before a particular tribunal." pp. 22-23;

(2) " . . . The essential independence of the exercise of the judicial power of the United States . . . requires that the Federal court should determine [a constitutional] issue upon its own record and the facts elicited before it" [and not upon a record developed before a magistrate]. p. 25;

(3) The "stenographic transcript" developed before a magistrate, "is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." p. 26.

In making the above-mentioned points, the State of California implies to this Court that it has been deprived of the independent judgment of an Article III judge who acted only after developing his own record.

Once again, however, this very telling and colorful rhetoric simply fails to apply to the facts of this case. After this case was remanded to him by the Ninth Circuit for a complete de novo determination of the magistrate's findings, Judge Byrne gave the State of California an ample opportunity to develop an independent record before an Article III judge through an evidentiary hearing.

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It was only after the hearing of April 4, 1980, at which time he developed his own independent record, that Judge Byrne acted to grant respondent's petition.

This Court will search in vain for any reference to the April 4 hearing in the Petition for a Writ of Certiorari.

For these reasons, should this court wish to address the Article III issue in light of the Magistrate's Act of 1976, this particular case may not be the best vehicle toward that purpose.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

III. THE FEDERAL HABEAS COURT PROPERLY REVIEWED THE CONSTITUTIONAL SIGNIFICANCE OF RESPONDENT'S STATEMENT OBTAINED IN VIOLATION OF MIRANDA v. ARIZONA, 384 U.S. 436 (1966).

Petitioner correctly states that a federal habeas court is restrained by statute and case law in the manner in which it may review state court findings of fact. Petitioner, however, asserts that the federal habeas court, and in turn the Ninth Circuit Court of Appeals, must have ignored the state court findings of fact in the instant case. Respondent respectfully submits that the record reflects that the federal habeas court and the Circuit Court of Appeals reviewing the lower court record respected the factual findings of the California Court of Appeal and properly analyzed those facts under the dictates of Chapman v. California, 386 U.S. 18 (1967).

It is noteworthy that petitioner ignores the existence of Chapman, 386 U.S. 18 (1967), and implicitly denies that the Miranda error found by the California Court of Appeal was in fact federal constitutional error. Respondent contends that the admission of his statement obtained by the police in violation of Miranda v. Arizona, 384 U.S. 436 (1966), was federal constitutional error, the dimension of which was correctly determined by application of Chapman, 386 U.S. at 24.

That a federal habeas court is restrained in its review of state court factual findings by Title 28 USC §2254(d) is well settled. See Sumner v. Mata, 449 U.S. 539 (1981). Petitioner asserts, however, that a federal habeas court should accept as "presumptively correct" the state court

finding that admission of the tainted statement at trial was "harmless beyond a reasonable doubt." (Petition for Writ of Cert., p. 36). There is no authority for such a proposition. As the United States Supreme Court observed in Townsend v. Sain, 372 U.S. 293 (1963):

> "By 'issue of fact' we mean to refer to what are termed basic, primary or historical facts: facts in the sense of a recital of external events and the credibility of their narrators . . . "
> 372 U.S. at 309.

Thus, a determination of "harmless error" is not a determination of fact but a legal conclusion. A federal habeas court may give different weight to facts as found by the state court and may reach a different conclusion in light of the applicable legal standards. Moreover, a mixed determination of law and fact requires the application of legal principles to historical facts. See Cuyler v. Sullivan, 446 U.S. 335, 342 (1980); Sumner v. Mata, —U.S.—, 102 S. Ct. 1303 at 1306, 1307 (1982).

In the instant case, the federal habeas court and the Circuit Court of Appeal upon review disturbed no factual findings made by the state. 4/ Instead, the federal habeas court applied the Chapman test in order to determine

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4/ In the Amendment of Opinion and Denial of Rehearing, the 9th Circuit Court of Appeals amended footnote 3 of its February 16, 1982 opinion to read "Thus, no finding of fact by the state jury or finding accepted by the California Court of Appeal is being reviewed." (Petitioner's Appendices, App. B, p. 2)

whether it could be concluded beyond a reasonable doubt that the Miranda error did not materially affect the verdict.

Respondent's tainted statement was the only unambiguous evidence showing he knew of his friends' intention to rob; neither the statement of crime partner Kicklighter nor that of Gutierrez indicates (1) a prior-existing agreement to rob, and (2) respondent's knowledge of that plan. Thus, respondent's tainted statement provided the strongest evidence of the plan to rob required to sustain a felony-murder conviction. In light of such evidence, the federal habeas court and the Circuit Court of Appeal weighed the evidence of felony-murder provided by the state court factual findings and found them wanting under Chapman. 5/

Petitioner attempts to minimize the devasting impact of the admission of respondent's tainted statement by focusing upon the possible exculpatory interpretation of the statement. The seminal case of Miranda v. Arizona, supra, addresses the fallacy of this position:

> "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.

5/ The paltry nature of the evidence of felony murder without benefit of the tainted statement has been attested to by the State of California's decision to accept a plea by respondent to murder in the second degree. (See Argument 1, p. 5-6)

> Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement were in fact truly exculpatory it would, of course, never be used by the prosecution."
>
> 384 U.S. 436 at 476-477 (1965). (Emphasis added).

Respondent's statement provided the clearest evidence of prior intent to rob and was the centerpiece of the prosecution felony-murder theory. The prejudice of its admission at trial was overwhelming. The federal habeas court properly concluded that the Miranda error was not harmless beyond a reasonable doubt.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

IV. THE TRIAL RECORD ESTABLISHES THAT THE TAINTED STATEMENT WAS ERRONEOUSLY ADMITTED IN THE PROSECUTION CASE IN CHIEF AND THEREFORE IS NOT GOVERNED BY THE DICTATES OF HARRIS v. NEW YORK, 401 U.S. 227 (1971).

Petitioner frames the issue in Argument III of its Petition regarding the admission of respondent's non-Mirandized statement in such a way as to obfuscate an otherwise straightforward record. Petitioner asserts that since under federal case authority of Harris v. New York, 401 U.S. 222 (1971), statements obtained in violation of Miranda v. Arizona, supra, can still be admitted for impeachment purposes, the federal habeas court should have considered "the impeaching effect of respondent's non-Mirandized statement in resolving whether its introduction was harmless beyond a reasonable doubt." (Petition for Writ of Cert., page 42).

Although petitioner's recitation of the law is sterling, its application to the instant facts is flawed. The record below is clear that respondent's statement was introduced in the prosecution case-in-chief and even petitioner concedes that a limiting instruction "should have been given" if impeachment were intended. (Petition for Writ of Cert., pp. 42-43). Absent such an instruction, the jury was free to consider the tainted statement as evidence of guilt. Therefore, it is at best wishful thinking for petitioner to discuss respondent's tainted statement in terms of "impeachment." In reality, the statement was introduced as substantive evidence of guilt arguably showing respondent's

prior knowledge of the planned robbery. Such a move by the prosecution compelled respondent to testify in order to clarify the statement and mitigate its prejudice to him. By no stretch of the imagination does such a sequence of events describe any known species of impeachment.

Thus, petitioner does not present a real issue to this Court but rather poses a hypothetical issue of what might be the legal consequences if the tainted statement had been admitted under different circumstances. The federal habeas court properly dealt with the actual state of the record and accordingly disposed of this illusory issue. Therefore, the harmless error analysis of the federal habeas court was valid.

For the foregoing reason, the Petition for Writ of Certiorari should be denied.

V. CONCLUSION

Petitioner has not raised meritorious issues for review by this Court. Accordingly, it is respectfully urged that petitioner's Petition for Writ for Certiorari be denied.

Respectfully submitted,

KAREN R. SMITH
Attorney for Defendant-Appellant

JAMES R. DUNN
Federal Public Defender

By _____
PETER M. HORSTMAN
Chief Deputy Federal Public Defender

Of Counsel

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-267

D. J. McCARTHY, Superintendent, California Men's Colony,

Petitioner,

v.

RUSSELL LEE HINMAN,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 1982, a copy of Response to a Petition for a Writ of Certiorari was mailed postage prepaid, to Shunji Asari and Owen Lee Kwong, Deputy Attorneys General, 3580 Wilshire Boulevard, Room 800, Los Angeles, CA 90010, counsel for the Petitioner.

JAMES R. DUNN
Federal Public Defender

By _____
PETER M. HORSTMAN
Chief Deputy Federal Public Defender

2 TRL/MOT — SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT. SOUTH

OCTOBER [redacted] 1975

HONORABLE SHEILA F PONDAS JUDGE — DEPT. D H LUTZ

201 R KING Deputy Sheriff — G ALDRIDGE Deputy Clerk / Reporter

CASE NO. A015821

(Parties and counsel checked if present)

Counsel for People: J COSPER

Deputy District Attorney: G JONES

Counsel for Defendant: J GALLAGHER DPD

CHARGE: 01 HINMAN RUSSELL LEE — 187 — 01CTS — 246.A — [redacted]

(BOX CHECKED IF ORDER APPLICABLE)

NATURE OF PROCEEDINGS

31 ☐ TRIAL — TRIAL REN — 42nd DAY — 07-14-75

32 ☐ ..... IS SWORN AS THE ENGLISH ..... INTERPRETER

33 ☐ DUE TO CONFLICT OF INTERESTS, PUBLIC DEFENDER RELIEVED, PURSUANT TO SECTION 987.2 PENAL CODE ..... IS APPOINTED

34 ☐ ON PEOPLE'S MOTION, AMENDMENT TO/AMENDED INFORMATION FILED/DEEMED FILED/INFORMATION AMENDED BY INTERLINEATION/AS FOLLOWS .....

35 ☐ ON ..... MOTION: CASE A ..... CONSOLIDATED INTO CASE A ..... AS COUNT(S) ..... THEREOF. SEE CASE A ..... FOR FURTHER PROCEEDINGS

36 ☐ MOTION PURSUANT TO SECTION 995 PENAL CODE GRANTED/DENIED/WITHDRAWN/CONTINUED TO .....

37 ☐ MOTION PURSUANT TO SECTION 1538.5 PENAL CODE CALLED FOR HEARING ☐ MOTION SUBMITTED PER STIPULATION (NO. 41) BELOW

38 ☐ DEFENDANT ADVISED OF CONSTITUTIONAL RIGHTS AND EFFECT OF PRIOR CONVICTIONS, WAIVES RIGHTS, ADMITS PRIOR(S): NO .....

39 ☒ CAUSE IS CALLED FOR TRIAL ☐ CAUSE SUBMITTED PER STIPULATION (NO. 41) BELOW

40 ☒ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TRIAL BY JURY and Court ..... COURT ACCEPTS WAIVER

41 ☐ By stipulation of defendant and all counsel cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to the court's rulings, with each side reserving the right to offer additional evidence and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that all exhibits received or marked for identification at the preliminary hearing are received in evidence and marked for identification in these proceedings, bearing the same number as used in the preliminary hearing, subject to the court's rulings. People's exhibit ..... (Preliminary Transcript) admitted into evidence by reference .....

42 ☒ Defendant advised and personally waives his right to confrontation of witnesses for the purpose of further cross-examination, and waives privilege against self-incrimination. Defendant advised of possible effects of plea on any alien or citizenship status

43 ☐ THE COURT STATES IT HAS READ AND CONSIDERED THE TRANSCRIPT OF THE PRELIMINARY HEARING

44 ☐ .....

45 ☐ ALL SIDES REST. COUNSEL WAIVE ARGUMENT/AROUS AND CAUSE IS SUBMITTED

46 ☐ MOTION PURSUANT TO SECTION 1538.5 PENAL CODE GRANTED/DENIED/WITHDRAWN/CONTINUED TO .....

47 ☐ COURT FINDS DEFENDANT NOT GUILTY .....

48 ☐ COURT FINDS DEFENDANT GUILTY AS CHARGED TO SECTION(S) ..... IN COUNT(S) ..... ☐ LESSER INCLUDED/RELATED OFFENSE

49 ☐ PRE TRIAL CONFERENCE HELD/OFF CALENDAR/CONTINUED TO .....

50 ☐ ☐ THE DEFENDANT ☐ THE PEOPLE ANNOUNCE(S) READY FOR TRIAL

51 ☐ THE COURT, DUE TO CONGESTED CALENDAR, TRAILS TRIAL ..... TO .....

52 ☐ ON ..... MOTION, TRIAL ..... IS SET/CONTINUED TO/REMAINS ..... AT ..... A.M. IN DEPT ..... REASON .....

53 ☐ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TIME FOR TRIAL

54 ☐ CAUSE TRANSFERRED TO DEPT ..... ☐ FORTHWITH ☐ ON ..... AT ..... A.M. FOR .....

55 ☐ DEFENDANT/WITNESS(ES) INSTRUCTED TO RETURN ON ABOVE DATE .....

56 ☒ DEFENDANT PERSONALLY WITHDRAWS PLEA OF NOT GUILTY TO COUNT(S) ..... REARRAIGNED

57 ☒ PLEADS GUILTY/~~NO CONTENDERE~~ WITH CONSENT OF DISTRICT ATTORNEY AND APPROVAL OF COURT TO VIOLATION OF SECTION(S) 187 PC, second degree IN COUNT(S) I ☐ LESSER INCLUDED/RELATED OFFENSE

58 ☒ DEFENDANT REFERRED TO PROBATION DEPARTMENT. ☒ DEFENDANT WAIVES TIME FOR SENTENCE PROBATION AND SENTENCE HEARING SET 11-29-82 AT 9 A.M. IN DEPARTMENT SOF INCLUDING

☐ DISPOSITION OF COUNTS ..... REMAINING

☐ DETERMINATION OF PRIORS ALLEGED/DEGREE/ARMED/USE/GREAT BODILY INJURY ALLEGATION

59 ☐ DEFENDANT WAIVES PROBATION REFERRAL, REQUESTS IMMEDIATE SENTENCE. (SEE SENTENCE BELOW/SEE ATTACHED SHEET)

60 ☐ FURTHER ORDER AS FOLLOWS .....

61 ☐ THE SHERIFF IS ORDERED TO ALLOW THE DEFENDANT ..... TELEPHONE CALLS AT DEFENDANT'S OWN EXPENSE

62 ☐ DEFENDANT FAILS TO APPEAR WITH/WITHOUT SUFFICIENT EXCUSE ☐ BAIL FORFEITED ☐ O.R. REVOKED

63 ☐ BENCH WARRANT ORDERED ISSUED/AND HELD UNTIL ..... NO BAIL/BAIL FIXED AT $ .....

64 ☐ DEFENDANT APPEARING, BENCH WARRANT ORDERED RECALLED/QUASHED ( ) RECALL NO ..... WRITTEN ( ) ABSTRACT FILED

65 ☐ UPON PAYMENT OF $ ..... COSTS BEFORE ..... AND FILING OF REASSUMPTION, ORDER OF ..... FORFEITING BAIL IS TO BE VACATED AND BAIL REINSTATED

66 ☐ REASSUMPTION FILED/COSTS PAID (RECEIPT NO .....) ORDER OF ..... FORFEITING BAIL VACATED, BAIL REINSTATED

67 ☐ DEFENDANT'S MOTION FOR RELEASE ON O.R./REDUCTION OF BAIL IS GRANTED/DENIED

68 ☐ BAIL RESET AT $ .....

☒ REMANDED ☐ BAIL ☐ BAIL EXONERATED ☐ BOND NO .....

RECEIVED

NOV 01 [illegible]

OFFICE OF THE
FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA

FILED
OCT 27 1982
JOHN A. CORGORAN, County Clerk
BY: J. E. [illegible], DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT S.O.J. HON. SHEILA F. POKRAS, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs. [redacted] No. A015821
RUSSELL LEE HINMAN, GUILTY PLEA
Defendant.

LONG B[illegible]CH, CALIFORNIA; THURS. OCTOBER 14, 1982; 11:50 A.M.

Upon the above date, the defendant being present in court represented by counsel, J. GALLAGHER, Deputy Public Defender; People being represented by J. COSPER, Deputy District Attorney; the following proceedings were held:

(Gloria Aldridge, Official Reporter)

MR. GALLAGHER: Does the court wish me to make this an 1192.5 offer? That way the court has the option -

THE COURT: Yes, conditional plea.

MR. GALLAGHER: Your Honor, the defendant Russell Hinman

will plead guilty to second degree murder under 1192.5 Penal Code. The case of course was 1975.

MR. COSPER: For the record, your Honor, perhaps we should explain some of the procedural background behing this case. Mr. Hinman was involved in a homicide back on the 19th of June, 1975, ultimately convicted of murder in the first degree in Judge Mullendore's court in November of 1975.

In December of 1975 the defendant was sentenced to state prison for a life sentence on first degree murder. Count II, assault with a deadly weapon, was ordered to run concurrent. The sentence becoming final upon completion of his sentence on the first degree murder conviction.

The California Court of Appeals affirmed the conviction. The California Supreme Court denied a hearing and the defendant ran a writ of habeas corpus in Federal District Court, they reversed the defendant's murder conviction.

The Ninth Circuit Court of Appeals affirmed that reversal instructing the defendant to be brought back and re-tried for murder.

At this time, there is a petition for writ of certiorari pending in U.S. Supreme Court and this plea is taken to a second degree murder being conditioned upon action or inaction by the U.S. Supreme Court. It is my understanding that sentencing will be in Department F in 45 days and if the Supreme Court grants the People's petition or grants the People's writ of certiorari and stays the proceedings the defendant will be returned to state prison on the first degree murder conviction.

If the Supreme Court denies hearing or denies People's petition the second degree murder conviction to which the defendant is entering his plea today will be in essence put into effect within 45 days the defendant to be sentenced in 45 days in Department F and we shall have some indication from the Supreme Court within 45 days whether any action is being taken or not. If no action has taken place the court would have the discretion to withdraw the defendant's plea of guilty and we'd set it back down for trial in the normal 60 day time limitations. Is that correct, Mr. Gallagher?

MR. GALLAGHER: That's correct.

THE COURT: Is that agreeable?

MR. GALLAGHER: Yes.

MR. COSPER: Mr. Hinman, do you understand what I have explained?

THE DEFENDANT: Yes.

MR. COSPER: You have had an opportunity to discuss this with your attorney, Mr. Gallagher?

THE DEFENDANT: Yes.

MR. COSPER: Is that what you wish to do, sir?

THE DEFENDANT: Yes.

MR. COSPER: Mr. Hinman in information A015821 you are charged with murder. Before the court can accept your plea of guilty to murder in the second degree I want to advise you of your constitutional and statutory rights as well as the consequences of your plea.

By pleading guilty you will be giving up certain rights including the right to jury trial. You already know

what a jury trial is but let me explain to you briefly. It is a trial in front of 12 members of the community selected by your attorney, Mr. Gallagher, and myself. They would sit in a jury box like the one behind me, listen to all of the evidence. To convict you they must agree unanimously People have proven your guilt beyond a reasonable doubt. If they are to acquit you, find you not guilty, they must also agree unanimously People have failed to prove your guilt beyond a reasonable doubt. By pleading guilty, Mr. Hinman, you will be giving up your right to jury trial.

You will also be giving up your right to confront and cross examine witnesses at that trial which means you have a right to be present in court throughout the entire trial and through your attorney, Mr. Gallagher, ask questions of all the witnesses that would testify. By pleading guilty you would be giving up that right also.

You would be giving up the power of the court to bring in witnesses to testify in your own behalf.

Finally, you are giving up your privilege against self-incrimination. This means you nave a right to remain absolutely silent throughout the entire proceedings. The fact of your silence cannot be held or used against you in any manner.

Do you understand these rights, Mr. Hinman?

THE DEFENDANT: Yes.

MR. COSPER: Do you understand by pleading guilty you will be giving up each of these rights?

THE DEFENDANT: Yes.

MR. COSPER: With regard to the consequences of your plea they have been explained to you basically. Murder in the second degree as the law was back in 1975 carries a sentence of 15 years to life.

MR. GALLAGHER: That's current law.

MR. COSPER: Carries a sentence of five years to life. No promises are being made to you concerning sentencing so in 45 days when you are returned before Judge Kelly he will either sentence you to state prison for five years to life or will allow you to withdraw your plea of guilty of the Supreme Court has taken no action by that day and set the matter back down for trial within 60 days. Do you understand that, Mr. Hinman?

THE DEFENDANT: Yes.

MR. COSPER: Having the consequences of your plea in mind is it still your desire to plead guilty?

THE DEFENDANT: Yes.

MR. COSPER: Mr. Hinman as indicated you are charged with murder. It is alleged on or about the 19th day of June, 1975 in the State of California, County of Los Angeles, you did willfully and unlawfully and feloniously with malice aforethought murder Harry Hopkins, a human being. Do you understand what you are charged with in count I of the Information, sir?

THE DEFENDANT: Yes.

MR. COSPER: Is the charge true?

THE DEFENDANT: Yes.

MR. COSPER: Mr. Hinman to information A015821 charging

you with murder in the second degree a felony, how do you now plead?

THE DEFENDANT: Guilty.

MR. COSPER: Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes.

MR. COSPER: Counsel join in the plea, concur in the waivers?

MR. GALLAGHER: I do.

THE COURT: The court will make a finding Mr. Hinman has knowingly, intelligently and voluntarily waived his constitutional rights. The court will enter the judgment.

At this time we will set P&S date November 29, Department South F at 9 o'clock.

MR. GALLAGHER: With the understanding if we get a decision from the Supreme Court earlier we can advance it.

MR. COSPER: I did indicate to Mr. Gallagher and I will indicate to Mr. Hinman that if any action occurs from the Supreme Court between this date and the 29th of November Mr. Gallagher will be notified immediately, Mr. Hinman will be returned to this court for further proceedings.

THE COURT: We do want a probation report rendered for that date?

MR. GALLAGHER: Yes.

THE COURT: Thank you, Mr. Hinman.

MR. COSPER: He's been sentenced on count II.

THE COURT: He's already been sentenced on the 245(a)?

MR. COSPER: He's been sentenced on the 245(a). That just goes along.

MR. GALLAGHER: That wasn't reversed.

MR. COSPER: The conviction was affirmed.

THE COURT: He is serving time on the 245(a).

MR. GALLAGHER: Yes.

THE COURT: Thank you, sir.

MR. COSPER: Thank you, your Honor.

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REPORTER'S CERTIFICATE

I, Gloria Aldridge, Official Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing original, signed reporter's transcript is a true and correct transcript of all of the admonitions given and waivers and admissions taken at the time of the taking of the plea in the above-entitled cause.

Dated this 26th day of October, 1982.

Gloria Aldridge
OFFICIAL REPORTER CSR 1178

FILED

OCT 9 1979

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL LEE HINMAN,

Petitioner-Appellee,

vs.

D. J. McCARTHY, Superintendent,

Respondent-Appellant.

No. 78-3005

ORDER FOR REMAND

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and HUG, Circuit Judges, and INGRAM,* District Judge.

California appeals from the district court's judgment granting Hinman a writ of habeas corpus, conditioned on the State failing to grant a new trial within 60 days. Hinman was convicted in California of first degree murder and of assault with a deadly weapon. The conviction was affirmed by a California Court of Appeal and the Supreme Court of California denied a hearing. His attempts to obtain relief by way of a writ of habeas corpus in the State courts were unsuccessful and he filed this application for the writ in the district court.

The matter was referred to a United States magistrate who presided at an evidentiary hearing and, by a report dated January 30, 1978, recommended that the writ be granted. The record contains nothing to indicate that the report was served on the State at that time. By order filed July 19, 1978, the district court adopted his recommendation, reciting:

*The Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

"The Court has reviewed the petition, the return, the records submitted therewith, the traverse, and the attached Report and Recommendation, and concurs with and adopts the findings and conclusions of the United States Magistrate."

Filed simultaneously with this order were the judgment and Magistrate's report. The judgment was entered on July 20, 1978 -- one day later.

The Magistrate's Act, as amended in 1977, permits a judge to designate a magistrate to conduct evidentiary hearings in habeas corpus matters brought by State prisoners. 28 U.S.C. §636(b)(1)(B). Subsection (C) provides that, "the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties." This language is followed by:

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A Judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

These provisions clearly were not observed. The magistrate's report was filed only one day before entry of judgment, therefore precluding the filing of any objections that the State might have wished to make and thus also precluding any de novo determination by the district judge of the proposed findings or recommendations to which the State might have objected.

We are not disposed to speculate, as Hinman would have us do, that the State would not have made objections even if the opportunity had been afforded. The statute sets very clear limits on the scope of the magistrate's participation in habeas corpus proceedings. Those limits have been exceeded here.

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We remand to the district court to provide the State the opportunities guaranteed it by Section 636. In view of the remand, we will not address the other issues raised by the State. If another appeal is taken, those issued may then be raised anew.

Reversed and remanded for proceedings consistant herewith.

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ENTERED

DEC 31 1980

CLERK, U S DISTRICT COURT
CENTRAL DISTRICT OF CA[illegible]
BY DEPUTY

FILED

DEC 31 1980

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner, v. D. J. McCARTHY, etc., Respondents.	CV 77-3012-WMB ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C.A. § 636(b)(3) (West Supp. 1980), attached is the Report and Recommendation of the United States Magistrate who has reviewed the petition filed herein for issuance of a writ of habeas corpus.

The Court has reviewed the petition, the return, the records submitted therewith, the traverse, ad the attached Report and Recommendation; it has further reviewed the respondent's Objections to the Magistrate's Report and Recommendation and the petitioner's Response to Respondent's Objections.

The Supreme Court has now held that the delegation of power to magistrates to make proposed findings and recommendations, which shall be subjected to a de novo determination by the district judge, does not violate Article III of the Constitution. See

United States v. Raddatz, 100 S. Ct. 2406, 2415-16 (1980). This district, therefore, did not violate the Constitution in delegating fact-finding and recommendation functions in habeas corpus proceedings, pursuant to the Federal Magistrates Act, 28 U.S.C.A. § 636(b)(1) (West Supp. 1980), because "the ultimate decision" is still made by this Court. Raddatz, 100 S. Ct. at 2416.

Respondent's challenge to the constitutionality of 28 U.S.C. § 2254 (1976), which provides federal habeas corpus relief for persons in state custody, is without merit. It is well-settled that federal district courts have jurisdiction to issue writs of habeas corpus after the prisoner in state custody has exhausted his state remedies. See, e.g., Rose v. Mitchell, 99 S. Ct. 2993, 3003 (1979); Jackson v. Virginia, 99 S. Ct. 2781, 2790 (1979); Wainwright v. Sykes, 433 U.S. 72, 78-81, 97 S. Ct. 2497, 2502-03; Stone v. Powell, 428 U.S. 465, 494 n.37, 96 S. Ct. 3037, 3052 n.37 (1976); Preiser v. Rodriguez, 411 U.S. 475, 485-94, 93 S. Ct. 1827, 1834-39 (1973). Because the petitioner has exhausted his state remedies, federal habeas relief is appropriate because the conviction was obtained in violation of his constitutional rights.

The Court concurs with the Magistrate's determination that there was insufficient evidence of specific intent to commit the offense of stealing, the felony that is requisite to support the conviction based on the felony-murder doctrine, absent the petitioner's statement, which was obtained without the warnings mandated by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). Because the only basis for sustaining the first-degree murder conviction was the felony-murder theory, and because there is insufficient constitutionally-obtained evidence of an underlying

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felony to support a conviction on that theory, the Magistrate was correct in concluding that the improper admission of the petitioner's statement was not harmless error within Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726 (1969).

Therefore, the Court concurs with and adopts the findings and conclusions of the United States Magistrate.

Accordingly,

IT IS ADJUDGED as follows:

1. That petitioner was convicted in violation of the Constitution of the United States.

2. That petitioner is entitled to a writ of habeas corpus from this Court.

IT IS ORDERED that a writ of habeas corpus will issue unless the respondent and the State of California shall, within 120 days from the date the Court's Judgment becomes final, institute proceedings for a new trial.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Order, the Judgment, and the Report and Recommendation of the United States Magistrate, by United States mail, on the petitioner, petitioner's counsel, the Attorney General of the State of California, and on the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles.

DATED: 30 December, 1980

Wm. Matthew Byrne, Jr.
United States District Judge

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